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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MARTIN ERNESTO CERVANTES, Defendant and Appellant.	B285203 (L.A. County Super. Ct. No. TA139012)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed in part; remanded with directions.

Robert D. Bacon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Steven E. Mercer Deputy Attorneys General, for Plaintiff and Respondent.

Martin Ernesto Cervantes appeals from a judgment following a jury trial. For the reasons explained below, we affirm the judgment of conviction. We vacate the sentence imposed and remand for the trial court to determine whether to strike firearm enhancements imposed pursuant to Penal Code section 12022.53,[1] and if an enhancement is stricken, to resentence Cervantes. We further remand for the trial court to correct certain errors in the abstract of judgment.

BACKGROUND

The following facts were not disputed at trial. On December 31, 2015 Cervantes and a fellow gang member named Raul Santillan stole a U-Haul truck loaded with items from a local church, and hit the parked car of Leon Smith with the stolen truck. Cervantes then shot Smith to death after Smith confronted Santillan about the damage to Smith's car. Five days later, as police attempted to arrest Cervantes, he and another individual fled in high speed car chase. During the chase, Cervantes repeatedly shot his AK-47 assault rifle out of the car's passenger window while being pursued by a police helicopter and marked law enforcement vehicles. After being taken into custody and while awaiting trial, Cervantes attacked a custodial officer in the jail where he was being held. Additional facts relevant to issues raised by Cervantes are detailed below as necessary.

Cervantes was charged with first degree murder, three counts of assault related to his discharge of the AK-47 during the January 5, 2016 chase, and other crimes not pertinent to this

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[1] All statutory references are to the Penal Code unless otherwise specified.

appeal, along with weapon and gang enhancements. At the close of the People's case, a judgment of acquittal was entered on a count alleging Cervantes fired at the police helicopter during the chase, after the court concluded there was insufficient evidence for the jury to conclude Cervantes specifically fired at the helicopter. Cervantes was found guilty on the remaining counts, and sentenced to an aggregate term of 83 years to life.

DISCUSSION

Cervantes appeals his convictions, as well as his sentence. He contends he was improperly denied his Sixth Amendment right of self-representation. He challenges the sufficiency of the evidence of premeditation on the first degree murder conviction, and the sufficiency of the evidence on two counts of assault. He also raises various claims of instructional error related to those murder and assault convictions. He contends he is entitled to another sentencing hearing in light of Senate Bill No. 620, which amended sections 12022.5 and 12022.53, effective January 1, 2018, to give trial courts discretion to strike certain firearm enhancements. Finally, he requests two corrections to the abstract of judgment.

1. Cervantes Waived his Sixth Amendment Self-Representation Claim by Requesting and Receiving Counsel

Cervantes claims the trial court improperly took away his ability to represent himself. The record shows, however, that Cervantes requested to be represented by counsel, and thus forfeited his claim of error.

a. Factual Background

Before the preliminary hearing, Cervantes appeared with counsel and requested to represent himself. After Cervantes completed a form advising of him of the risks and responsibilities of self-representation, his request was granted. His now-prior counsel was relieved, and standby counsel was appointed. Approximately one month after his request for self-representation was granted, Cervantes assaulted a deputy in the County jail. After an administrative hearing, the Sheriff's Department revoked Cervantes's self-representation privileges (including access to the law library and telephone usage) due to a propensity for violence, and violation of law and jail rules.

After his self-representation privileges in jail were taken away, Cervantes appeared in court for arraignment on new charges related to the jailhouse assault. He told the court "My status is suspended. I like to revoke my right to counsel." Cervantes suggests we should not interpret his request to "revoke" his right to counsel as meaning he was trying to "invoke" his right to counsel. However, the record shows he was asking for a lawyer, and the court interpreted his statement as asking for a lawyer. Cervantes referred to the jail suspending his self-representation privileges. Cervantes was already representing himself, so there was no counsel to "revoke."

The preliminary hearing judge responded to this request by expressing concern that Cervantes was playing games to delay the proceedings by now requesting a lawyer after previously having asked to represent himself. The judge reminded Cervantes that when the court agreed to let Cervantes represent himself, it warned Cervantes he should not expect a lawyer to be

appointed if something went wrong. The court concluded by telling Cervantes he should be prepared to continue representing himself. Cervantes said nothing during this exchange to suggest the court was mistaken, and that he was not in fact requesting counsel.

The hearing was then adjourned before resuming later that same day. When the hearing resumed, the court indicated it had reviewed the inmate disciplinary report, and changed its mind regarding Cervantes's request for counsel. The court found "that Mr. Cervantes has forfeited any right to pro per status based on his own conduct," and appointed standby counsel as counsel for all purposes. Defense counsel then asked to postpone the preliminary hearing so counsel could prepare.

In response, Cervantes raised no objection to the appointment of counsel. This lack of objection was unsurprising as the court appointed counsel as Cervantes requested earlier in the hearing. Cervantes further agreed to waive time for his just-appointed counsel to prepare for the preliminary hearing. Counsel thereafter continued to represent Cervantes throughout the proceedings below.

b. There was no Sixth Amendment Violation

The Sixth Amendment gives criminal defendants the right to represent themselves. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).) That right is not absolute, as the " 'government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.' " (*People v. Williams* (2013) 58 Cal.4th 197, 253.) A trial court exercises considerable discretion in determining whether to terminate self-representation, and its ruling will not be disturbed

in the absence of a strong showing of clear abuse. (*People v. Becerra* (2016) 63 Cal.4th 511, 518.)

Cervantes argues there was error because the court appointed counsel only after terminating his right to represent himself, and without adequately analyzing the factors required to be addressed when a court revokes that right. (E.g., *People v. Becerra*, *supra*, 63 Cal.4th at p. 518; *People v. Carson* (2005) 35 Cal.4th 1.) He further argues error because the court did not establish a record from which it could exercise its discretion before appointing counsel, citing *People v. Elliot* (1977) 70 Cal.App.3d 984, 993–994 [upholding denial of defendant's request to terminate self-representation after jury selection was completed].

We need not address whether the court made the requisite findings when revoking in propria persona status, because Cervantes forfeited any claim of error. The cases on which Cervantes relies involve very different situations: a trial court denying a request for self-representation,[2] a trial court revoking self-representation when the defendant wanted to continue representing himself,[3] or a defendant who elected to represent himself having a later request for counsel denied.[4] Unlike the defendants in those cases, Cervantes got what he requested. The court below granted Cervantes's request to represent himself.

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[2] E.g., *People v. Dent* (2003) 30 Cal.4th 213.

[3] E.g., *People v. Becerra*, *supra*, 63 Cal.4th 511; *People v. Butler* (2009), 47 Cal.4th 814; *People v. Carson*, *supra*, 35 Cal.4th 1.

[4] E.g., *People v. Elliot*, *supra*, 70 Cal.App.3d 984.

Cervantes thereafter requested counsel, and counsel was appointed. Once Cervantes got the counsel he requested, he did not raise any objection to the appointment or further seek to represent himself. He cannot now claim the appointment of counsel that he requested is error.

The right to self-representation "is forfeited unless the defendant ' "articulately and unmistakably" ' demands to proceed in propria persona." (*People v. Valdez* (2004) 32 Cal.4th 73, 99.) A defendant's waiver or abandonment of his right to self-representation should be voluntary, knowing and intelligent; "such waiver or abandonment may be inferred from a defendant's conduct." (*People v. Trujeque* (2015) 61 Cal.4th 227, 262–263.) Unlike the defendant in *Trujeque*, who vacillated about whether to stop representing himself which necessitated follow-up questioning by the court (*id*. at pp. 261–262), Cervantes did not equivocate. Cervantes made a knowing, voluntary and intelligent request to have counsel appointed once the jail suspended his self-representation privileges. Because Cervantes did not make an articulate and unmistakable demand for self-representation, there is no Sixth Amendment violation. (*Faretta*, *supra*, 422 U.S. at pp. 820–821; *People v. Williams*, *supra*, 58 Cal.4th at p. 254.)

2. Sufficiency of the Evidence

a. There Was Sufficient Evidence of Premeditation

Cervantes challenges the sufficiency of the evidence of premeditation supporting his first degree murder conviction. Cervantes argues that he shot Scott only seconds after seeing him, and in the course of trying to defend his fellow gang member, and therefore could not have acted with premeditation.

To assess the sufficiency of the evidence, we consider "the entire record in the light most favorable to the judgment below to determine whether it contains substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1068–1069.)

First degree murder requires more than a showing of intent to kill—the murder must be deliberate and premediated. (§ 189, subd. (a).) While section 189, subdivision (a) lists examples such as poison and torture, they are not exhaustive—first degree murder encompasses any kind of "willful, deliberate and premeditated killing." "Deliberate" refers to a "careful weighing of considerations in forming a course of action"; "premeditated" means "thought over in advance." (*People v. Mendoza*, *supra*, 52 Cal.4th at p. 1069.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Jennings* (2010) 50 Cal.4th 616, 645.) " ' " 'Premeditation and deliberation can occur in a brief interval.' " ' " (*Mendoza*, *supra*, 52 Cal.4th at p. 1069.) " ' "The test is not time, but reflection. 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " "" (*Ibid.*)

"We normally consider three types of evidence to determine whether a finding of premeditation is adequately supported—preexisting motive, planning activity, and manner of killing." (*People v. Jennings* (2010) 50 Cal.4th 616, 645.) However, " '[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation.' " (*Ibid.*) For example, the fact that a defendant

shot his victim four times at close range "could well support an inference by the jury that the manner of killing was 'particular and exacting.' " (*People v. Wright* (1985) 39 Cal.3d 576, 594.)

The evidence at trial showed that on the evening of December 31, 2015, Cervantes and others smoked methamphetamine together. They stopped beside a U-Haul in Long Beach. Cervantes broke into the truck and started the engine. After stealing the U-Haul, Cervantes's fellow gang member Santillan drove the U-Haul from Long Beach to Compton while Cervantes followed in his SUV. Santillan hit victim Leon Scott's car with the U-Haul when trying to park. Scott came out from his residence and shouted at Santillan for hitting Scott's car. Cervantes then got in his SUV, Santillan got into the U-Haul, and they both drove off. Scott got into his car and followed them. After going a short distance, all three vehicles stopped. Scott went to the U-Haul to pull Santillan out of the truck and confront him. Deciding he "needed to save" his fellow gang member from an assault by Scott, Cervantes grabbed an AR-15 assault rifle from his SUV, got out of his vehicle, approached Scott, and shot Scott multiple times—including in the head. Cervantes was less than 10 yards from Scott when he fired the gun. There was no evidence Scott had a weapon, and Scott had no defensive injuries suggesting he fought with Santillan.

Considering the entire record in the light most favorable to the judgment below, there was substantial evidence from which a rational trier of fact could find Cervantes guilty beyond a reasonable doubt of premeditation. Cervantes saw Scott confronting Santillan. A rational trier of fact could have concluded Cervantes made the following decisions demonstrating

planning activity: to grab his gun, to get out of his car, to walk over to Scott, to point the gun at Scott, and to shoot him not once but multiple times at close range, including in the head. While those events occurred rapidly, a rational jury could find these decisions demonstrated thought and reflection, rather than an unconsidered impulse or imperfect defense of another, and thus conclude the murder was deliberate and premeditated.

b. The Court Did Not Err in Denying Cervantes's Section 1118.1 Motion

Cervantes was charged with three counts of assault related to the January 5, 2016 high speed chase: one count of shooting at the overhead Sheriff's Department helicopter in violation of section 246, and two counts of assault on a peace officer (namely, persons with the Los Angeles Sheriff's Aero Bureau) with an assault weapon in violation of section 245, subdivision (d)(3).

At the conclusion of the People's case-in-chief, the defense made a section 1118.1 motion for judgment of acquittal on the three assault counts. The court granted the motion on the section 246 count, finding insufficient evidence Cervantes discharged a firearm "at" the helicopter as required by the statute. The court denied the motion as to the two section 245, subdivision (d)(3) counts. Recognizing the lack of evidence Cervantes targeted the helicopter, the court nevertheless found it reasonable to infer that Cervantes was firing at officers during the chase to delay them. Thus, in the court's view, there was sufficient evidence for the jury to conclude that a reasonable person would have realized firing the assault weapon would directly and probably result in the application of force as required to find the defendant guilty under section 245, subdivision (d)(3).

Cervantes argues this ruling was error, claiming if there was insufficient evidence he shot at the helicopter there was also insufficient evidence that he assaulted individuals with the Los Angeles Sheriff's Aero Bureau in the helicopter.

We review "the denial of a section 1118.1 motion under the standard employed for reviewing the sufficiency of the evidence supporting a conviction." (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.) " '[W]e do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the [ruling below] to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the denial of a section 1118.1 motion the existence of every fact the trier could reasonably deduce from the evidence.' " (*Ibid*.)

Examining the entire record in this light, there was sufficient evidence supporting the denial of the motion for a judgment of acquittal. On January 5, 2016, five days after Leon Scott's murder, sheriff's deputies had Cervantes under surveillance at a motel in Compton. After Cervantes left the motel carrying an assault rifle, and got into a Honda Civic driven by another individual, Deputy Steven Nemeth attempted a felony traffic stop. The Civic responded by taking off at a high rate of speed with Deputy Nemeth and other officers pursuing in their vehicles. A Sheriff's Department helicopter joined the pursuit, shining a spotlight on the Civic. Deputies testified they saw a number of muzzle flashes coming from the passenger side of the Civic (the side on which Cervantes was sitting). Deputy Nemeth, who was in the lead chase vehicle, testified that he thought

Cervantes was shooting at him, and backed off because he did not want to get shot.

The section 246 charge required that Cervantes maliciously and willfully discharged his firearm "at an . . . occupied aircraft." In contrast, a section 245 assault charge is a general intent crime. (*People v. Williams* (2001) 26 Cal.4th 779, 788.) It does not require a specific intent to injure the victim. (*Ibid.*) The requisite intent exists when the defendant "actually knows facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery." (*Ibid.*) In other words, the defendant "must be aware of facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Ibid.*)[5] Under the language of the statute, "[a]ssault with a deadly weapon can be committed by pointing a gun at another person [citation], but it is not necessary to actually point the gun directly at the other person to commit the crime." (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263.) When a defendant

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[5] Cervantes places great weight on *People v. Carmen* (1951) 36 Cal.2d 768, 775, which cites cases that stood for the proposition that "it is not an assault to fire a gun in the air for purposes of frightening another" but "it is an assault, *without regard to the aggressor's intention*, to fire a gun *at another or in the direction* in which he is standing." (Second italics added.) In arguing this language from *Carmen* requires evidence the gun was fired at or in the direction of the victim, Cervantes omits the very next sentence of the opinion which makes clear the prior precedents *Carmen* cites for that statement "fly in the face of the wording of section[] 245 of the Penal Code," and clarifies that "in assault cases intent need not be specific— to cause any particular injury and may be implied from the act." (*Id.* at pp. 775–776.)

equips and positions himself to carry out a battery, he is capable of inflicting injury even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury. (*People v. Chance* (2008) 44 Cal.4th 1164, 1172.)

Here, the record at the time of the section 1118.1 motion showed Cervantes repeatedly fired an assault weapon to deter and delay the sheriff's deputies chasing him. A rational trier of fact could conclude based on that evidence Cervantes was aware that his actions would directly, naturally, and probably result in physical force being applied to those pursuers—whether in the air or on land.

3. The Trial Court Did Not Abuse Its Discretion in Permitting Amendment of One of the Assault Counts to Name a Deputy on the Ground as a Victim

Cervantes claims the trial court abused its discretion by allowing the People to amend one of the January 5, 2016 assault counts before it was submitted to the jury to name Deputy Nemeth as the victim.[6] An information may be amended at any stage of the proceedings to charge an offense shown by evidence presented at the preliminary hearing. (§ 1009; *see also People v.*

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[6] As noted above, when trial began, the two section 245, subdivision (d)(3) assault counts related to the January 5, 2016 chase named the Los Angeles Sheriff's Aero Bureau as the victim. The other section 245, subdivision (d)(3) assault count was amended before it was submitted to the jury to name a specific individual with the Aero Bureau. Cervantes does not appeal the decision to permit that amendment.

Jones (1990) 51 Cal.3d 294, 317 [" 'at a minimum, a defendant must be prepared to defend against all offenses of the kind alleged in the information as are shown by evidence at the preliminary hearing to have occurred within the timeframe pleaded in the information' "]; *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1580–1581 ["A court may allow an amendment of an accusatory pleading at any time up to and including the close of trial so long as there is no prejudice to the defendant."].) The trial court's decision to allow an amendment is reviewed for abuse of discretion. (*Arevalo-Iraheta*, *supra*, 193 Cal.App.4th at p. 1581.)

Deputy Nemeth testified at the preliminary hearing to the following. On January 5, 2016, Deputy Nemeth was in full uniform in a marked patrol car while surveilling Cervantes. Cervantes left the motel room with an assault rifle and got into a Honda Civic driven by another individual. Deputy Nemeth drove after the Civic while waiting for a police helicopter to arrive. When the helicopter arrived, Deputy Nemeth turned on his lights and siren, at which point the Civic ran a red light and took off. When the Civic and Deputy Nemeth were driving on an overpass above the 710 freeway, Nemeth saw five to eight flashes of what appeared to be gunfire lighting up the passenger side of the Civic. Deputy Nemeth was approximately 100 feet from the Civic at the time. After Cervantes was arrested, deputies recovered a loaded AK-47 assault rifle on the front passenger seat of the Civic with Cervantes's gang moniker written on the rifle in gold ink. Deputies also recovered 12 spent assault rifle cartridges. After

his arrest, Cervantes told a deputy sheriff that Cervantes was shooting at the helicopter.[7]

In light of the evidence adduced at the preliminary hearing, the court did not abuse its discretion in permitting one of the January 5, 2016 assault counts to be amended to name Deputy Nemeth as the victim. Deputy Nemeth testified he was in a high speed pursuit approximately 100 feet from Cervantes when he saw Cervantes appear to fire his assault weapon multiple times, and spent cartridges were later recovered indicating Cervantes had in fact fired his weapon. Whatever Cervantes's own statement about his aim, Deputy Nemeth's testimony was sufficient to put Cervantes on notice to be prepared to defend against a charge of assault naming Nemeth as a victim.

Cervantes further claims that even if it was supported by the preliminary hearing evidence, the amendment improperly prejudiced him. He argues he was sandbagged because as the case was tried, the assault count could be defended on the basis that the shots were fired at ground level. With the amendment, this defense would become an admission to an amended count of shooting at someone on the ground.

While the assault charge hypothetically could have been defended on the basis that the Cervantes was shooting at officers on the ground and not in the air, that is not in fact what happened. Cervantes points to nothing in the record showing such a trial defense, or any resulting prejudice. Cervantes's trial counsel did not object to the proposed amendment based on any

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[7] At trial, evidence regarding this statement was not presented in the People's case-in-chief, but was elicited when the People cross-examined Cervantes.

claimed prejudice. In fact, Cervantes did not defend himself by arguing he was shooting at the ground. Defense counsel stated in his opening statement the evidence would show Cervantes fired his gun up in the air during the chase to scare away the helicopter. This was consistent with the statement Cervantes himself made after his arrest. Cervantes's claim of prejudice is without merit.

4. There Was No Reversible Error in the Jury Instructions

a. CALCRIM No. 640 Instruction on Unanimity

The jury was instructed on the elements of first and second degree murder, as well as voluntary manslaughter. The verdict form contained a blank for jurors to complete as to whether any verdict of murder was in the first or second degree. However, the CALCRIM No. 640 instruction given to the jury regarding deliberations, the need for unanimity in the jury's verdict, and the completion of the verdict form referred only to first degree murder and voluntary manslaughter, and omitted any reference to second degree murder.

Cervantes asserts this omission was prejudicial error because the instructions did not recognize the possibility of second degree murder as a lesser included defense, and improperly explained the need for the jury's verdict to be unanimous. Cervantes did not object below to the CALCRIM No. 640 instruction as given, but the Attorney General acknowledges Cervantes has not forfeited any claim of error because the court had a sua sponte duty to instruct on unanimity, and on all lesser included offenses. (*People v. Avalos* (1984) 37 Cal.3d 216, 228–229 [addressing claimed error in unanimity

instruction despite defendant's failure to object]; *People v. Breverman* (1998) 19 Cal.4th 142, 148–149 ["California law requires a trial court, sua sponte, to instruct fully on all lesser necessarily included offenses supported by the evidence."].)

" '[T]he correctness of [a] jury instruction[ ] is to be determined from the entire charge of the court,' " not from a particular instruction or parts of the instructions. (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) "A defendant challenging an instruction as being subject to an erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*People v. Cross* (2008) 45 Cal.4th 58, 67–68.) "We 'credit jurors with intelligence and common sense,' " and do not assume these virtues are abandoned when presented with jury instructions. (*People v. McKinnon* (2011) 52 Cal.4th 610, 643.)

Looking at the entire charge to the jury, the jury was appropriately instructed regarding the possibility of second degree murder as a lesser included offense. The jurors were not, as Cervantes contends, led to believe their only choices were first degree murder and voluntary manslaughter. The jurors were instructed in other parts of the charge on the elements of first degree murder and the relevant lesser included offenses— second degree murder and voluntary manslaughter. The jury sent a note during deliberations stating, "We need more information to differentiate between murder in the first & 2nd degree specifically the criteria for 2nd degree murder"—demonstrating

they understood second degree murder was a lesser included offense they should consider (and were in fact considering).[8]

Nor do we find reversible error with regard to the instruction on unanimity. While the unanimity instruction did not explicitly mention second degree murder, it stated that as to "all of the charges in this case, to return a verdict of guilty or not guilty on a count, you must all agree on that decision." There is no indication the lack of express mention of second degree murder in the unanimity instruction had any effect on the verdict. There is no indication to jurors failed to understand unanimity was required on "all of the charges in the case" as the instruction stated. The jurors reached a unanimous verdict on the murder charge, and unanimously agreed it was in the first degree. The jury further reached a unanimous verdict on other counts, as well as firearm and gang enhancements, despite there being no explicit mention of those other counts or enhancements in the unanimity instruction. They also unanimously found gang enhancements should not apply to other counts. We find no reversible error with regard to the unanimity instruction.

b. CALCRIM No. 521 Instruction on Premeditation

The jury was instructed on premeditation using CALCRIM No. 521. The instruction included in its definition of premeditation the following: "Defendant acted with *premeditation* if he decided to kill before completing the act that caused death." Cervantes argues this definition prejudiced him

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[8] With agreement of the parties, the court answered this question by referring the jury to the relevant instructions defining first and second degree murder, and the effect of provocation.

by erroneously conflating premeditation with the intent to kill (willfulness), which can occur without premeditation.

Cervantes forfeited any claim of error by stipulating to the giving of this instruction, and failing to request the trial court make any modification or clarification to it. If Cervantes wanted a modification to this standard instruction, he had a duty to make a timely and specific request to the trial court. (*People v. Kelly* (1992) 1 Cal.4th 495, 535). " 'The trial court cannot reasonably be expected to revise or improve accepted and correct jury instructions absent some request from counsel.' " (*Ibid*.)

CALCRIM No. 521 is an accepted instruction that correctly stated the law as it applied here. Cervantes focuses on one sentence discussing premeditation, but ignores the entirety of the instruction, which states:

"The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the act that caused death.

"The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to

kill can be reached quickly. The test is the extent of the reflection, not the length of time.

"The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, *First or Second Degree Murder With Malice Aforethought*.

"The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder."

"Premeditated" means thought over in advance or considered beforehand. (*Mendoza*, *supra*, 52 Cal.4th at p. 1069; *In Re C.R.* (2008) 168 Cal.App.4th 1387, 1393.) We do not agree that CALCRIM No. 521 collapses the distinction between the intent to kill (willfulness) and deliberateness/premeditation. The jury was instructed that it had to find Cervantes carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The jury was further instructed that a decision made rashly, impulsively, or without careful consideration was not deliberate and premeditated. Viewing the instruction in its entirety, Cervantes has not shown a reasonable likelihood that jurors understood the instruction in the manner he claims. (*People v. Cross*, *supra*, 45 Cal.4th at pp. 67–68.)

c. CALCRIM No. 371 Instruction on the Concealment of Evidence

Cervantes asserts the court erred in giving an instruction over his objection on potential hiding of evidence.[9] CALCRIM No. 371 is a standard instruction regarding inferences that can be drawn from attempts to hide evidence. Based on CALCRIM No. 371, the jury here was instructed: "If the defendant tried to hide evidence, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

The People requested the instruction based on two pieces of evidence: that Cervantes told Santillan when he dropped Santillan off at home after Scott was killed, "Shut the f*** up. Nothing happened. Nothing happened," and that Cervantes told another cohort present at the shooting, " 'You better not say nothin.' " The court gave the instruction over defense objection, additionally noting the instruction was justified based on Cervantes's attempt to hide a firearm at his uncle's house after the murder.

Cervantes first argues this instruction exists to benefit the defense, and therefore it is error to give it over defense objection. He cites no authority for this proposition, instead relying on inapposite cases (1) addressing the need for cautionary language of the type the court here gave, namely that "evidence of such an attempt cannot prove guilt by itself," (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224); (2) addressing whether defense counsel's

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[9] Defense counsel objected to the instruction, but did not articulate the grounds of the objection.

decisions with regard to a consciousness of guilt instruction was or was not ineffective assistance of counsel (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1053; *People v. Maury* (2003) 30 Cal.4th 342, 394; *People v. Hawkins* (1995) 10 Cal.4th 920, 942); and (3) rejecting the argument that the trial court has a sua sponte duty to give a cautionary instruction where one is not requested by the defendant. (*People v. Diaz* (2015) 60 Cal.4th 1176, 1191−1193.)

Cervantes did not have a unilateral right to decide whether the jury was instructed on spoliation. The prosecution is entitled to request such an instruction where appropriate, and the evidence here supported the giving of the instruction. Nor did the instruction direct how the jury was to consider any such evidence. The instruction contained the appropriate cautionary language that it was up to the jury to decide the evidence's meaning and importance, and that evidence of such an attempt cannot prove guilt by itself.

Cervantes next argues the instruction was factually unsupported—not because there was no testimony about Cervantes attempting to hide evidence, but because the contested issue on the murder charge was not whether Cervantes killed Scott, but Cervantes's mental state and whether the killing was first degree murder, second degree murder, or voluntary manslaughter. This is essentially an objection not to the jury instruction, but to the admission of the spoliation evidence and its relevance—an issue Cervantes did not raise on appeal or brief. While Cervantes did not dispute at trial that he killed Scott, the People still needed to prove their case—including the gang enhancement. To do so, the People were entitled to use the admissible evidence at their disposal, which included the

statements made by Cervantes after the shooting to potential witnesses (including a fellow gang member) not to say anything.

Finally, Cervantes argues he was prejudiced because if his objection was sustained and the instruction not given, the jury could have inferred his statements about not saying anything were designed to calm emotionally overwrought companions. Cervantes testified at trial, and his counsel was certainly entitled to argue that was the meaning and importance of Cervantes's comments. The People were equally entitled to argue the meaning and importance of those statements was more nefarious. The instruction did not direct the jury to favor one argument over the other, but left it up to the jury to decide while reminding the jury that such evidence could not prove guilt by itself. There was no error, and no prejudice to Cervantes, from the giving of this instruction.

5. Cervantes is Entitled to a Remand for Resentencing

Cervantes's sentence included the imposition of two firearm enhancements pursuant to section 12022.53. At the time Cervantes was sentenced, section 12022.53 expressly provided that a trial court could not strike "an allegation under this section or a finding bringing a person within the provisions of this section." (See former Pen. Code, § 12022.53, subd. (h).)

On October 11, 2017, the Governor signed Senate Bill No. 620, which amended both sections 12022.5 and 12022.53 to strike the language prohibiting striking the enhancement and in its place providing: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this

section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, §§ 1–2.) Senate Bill No. 620 does not contain an urgency clause. (*Ibid*.) Thus, it went into effect on January 1, 2018. (*See People v. Camba* (1996) 50 Cal.App.4th 857, 865–866 [operative date is "January 1 of the year following" enactment].)

Cervantes contends, the Attorney General acknowledges, and we agree, that the change to section 12022.53 applies to any judgment that was not final on January 1, 2018, including this case, and that Cervantes is entitled to a remand for resentencing. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507.)

6. Corrections to the Abstract of Judgment on Remand

Cervantes additionally requests remand to correct two errors in the abstract of judgment. With regard to the murder count (count 7), the abstract reflects an enhancement of 15 years under section 186.22, subdivision (b)(4). Cervantes argues, and the Attorney General agrees, that the referenced Penal Code provision does not set forth an enhancement but rather a minimum term to be served before parole eligibility. Both parties agree, and we concur, that the reference to section 186.22, subdivision (b)(4) as an enhancement should be deleted from the abstract.

The parties further agree, and we concur, that the abstract incorrectly lists section 245 as the offense of conviction on count 8, when in fact Cervantes was convicted on that count of a violation of section 243.

The matter is further remanded for the court make these corrections to the abstract of judgment.

DISPOSITION

The convictions are affirmed. Upon remand, the trial court shall determine whether to strike the firearm enhancements previously imposed under section 12022.53. If the court strikes any such enhancements, the court shall reduce the sentence accordingly and amend the abstract of judgment, including on counts seven and eight in accordance with section 6 of this opinion. If the court does not strike any such enhancements, the court shall modify its minute orders as well as the abstract of judgment in accordance with section 6 of this opinion. The court shall forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

WEINGART, J.*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.